

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE
COMPANY, Subrogee of JAMIE and LAURA
GYMORY,

UNPUBLISHED
October 26, 2004

Plaintiff-Appellee,

v

DETROIT EDISON COMPANY,

No. 248576
Sanilac Circuit Court
LC No. 02-028555-NZ

Defendant-Appellant.

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as on leave granted from an order granting plaintiff summary disposition. We reverse. The relevant allegations are not disputed. On July 30, 1999, an allegedly worn primary electrical distribution wire carrying 40,000 volts broke and fell onto a secondary electrical distribution wire carrying 4,800 volts. The contact between the lines created a surge of excess voltage that entered the Gyomorys' home through the electrical wiring system and set fire to the structure. They were insured under a policy of homeowner's insurance with plaintiff, who paid \$143,514.78 on the claim.

Plaintiff filed suit against defendant alleging negligence, breach of implied warranties, breach of contract, and nuisance for failure to install, repair or monitor the line and failure to ensure that the electricity supplied to the Gyomorys' home was fit for its intended use. Defendant moved for summary disposition arguing that because the claims arose from its contractual relationship with Gyomorys, they had to be dismissed and re-filed with the Public Service Commission pursuant to the doctrine of primary jurisdiction. The trial court denied the motion on the basis of this Court's decision in *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524; 618 NW2d 32 (2000). Defendant applied for leave to appeal. This Court denied defendant's application because it was not persuaded of the need for immediate review. However, our Supreme Court remanded for consideration as on leave granted, and directed us to consider whether a conflict existed between *Michigan Basic*, *supra*, and *Durcon Co v Detroit Edison Co*, 250 Mich App 553; 655 NW2d 304 (2002). It further directed us to consider whether either or both of these decisions comported with *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001).

With respect to *Michigan Basic, supra*, and *Durcon, supra*, we find no conflict. In *Michigan Basic, supra* at 527, the plaintiffs alleged that the defendant's negligent design, installation, inspection, and maintenance of its electrical transmission equipment caused a power surge, which resulted in a fire that damaged plaintiffs' insured's store. This Court found that plaintiffs' claim sounded in tort. The plaintiffs' allegations that the defendant breached its duty to handle electrical power transmission equipment in a safe and reasonable manner clearly comported with the elements of negligence. *Id.* at 535. This Court noted the purpose of the primary jurisdiction doctrine:

Primary jurisdiction "is a concept of judicial deference and discretion." *Michigan Basic, supra* at 529, quoting LeDuc, Administrative Law, § 10:43, p 70. A court of general jurisdiction considers the doctrine of primary jurisdiction "whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency." *Id.*

But this Court stated, "the complexities of the regulatory scheme generally will not be implicated where the plaintiff's claim is for personal injury, *property damage not covered by the tariffs*, or other tortious activity, *because the regulatory scheme is not designed to address these matters.*" *Michigan Basic, supra* at 535, quoting *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 75; 559 NW2d 647 (1997) (emphasis in *Michigan Basic, supra*). This Court distinguished between a suit alleging a violation of a tariff and a suit to enforce a right or duty established by a tariff. "Recalling *Valentine*, the Court distinguished claims sounding in tort and claims alleging violations of the tariffs from claims that arose from disputes over the rights and duties of the parties as expressed in the tariffs." *Michigan Basic, supra* at 533 (Referring to the Supreme Court's decision in *Rinaldo's, supra* at 75-76).

Further citing *Rinaldo's*, this Court noted that the primary jurisdiction doctrine governed tort claims alleging violations of duties arising solely from the parties' contract. *Michigan Basic, supra* at 533-534. Nonetheless, it found that the duty existed in absence of a contract, *id.*, at 537, and it found that the primary jurisdiction doctrine did not apply. "Fire damage to property caused by a power surge implicates alleged tortious conduct by defendant and, consequently . . . the primary jurisdiction doctrine is inapplicable." *Id.* at 526.

In *Durcon, supra* at 555, plaintiff alleged, among other things, that defendant breached the parties' contract and committed negligence per se by violating the Michigan Administrative Code Standards of Quality of Service, and negligence per se by violating Tariff 9, Rule B-3.2. This Court again noted that whether primary jurisdiction applied depended on the nature of the claim: "whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency 'necessarily depends upon the agency rule at issue and the nature of the declaration being sought in the particular case.'" *Id.* at 557, quoting *Travelers, supra*, quoting *Judicial review of administrative agency rules: a question of timing*, 43 Baylor L R 139, 159 (1991). This Court then acknowledged that the MPSC had authority to hear breach of contract claims. *Id.* at 558.

With respect to the negligence per se¹ claims, this Court stated “[g]enerally, if a plaintiff seeks relief in a court of general jurisdiction, ‘the court may entertain (1) a cause of action in tort or (2) a claim that the . . . company has violated the regulatory code or tariffs.’” *Durcon, supra* at 559, quoting *Rinaldo’s, supra* at 73. But it cautioned, “‘the jurisdictional question is not to be resolved by mere allegation, but rather by analysis of whether the facts pled give rise to a legal duty in tort independent of breach of contract.’” *Durcon, supra* at 559, quoting *Rinaldo’s, supra* at 82. This Court found that where the breach of duty “‘arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort,’ primary jurisdiction rest[ed] with the MPSC.” *Durcon, supra* at 559-560.

Importantly, this Court did not reach the issue whether the plaintiff’s negligence claims were subject to the primary jurisdiction doctrine:

We recognize that *Durcon* has also asserted claims of general negligence and fraud, over which the circuit court arguably has jurisdiction. However, because these claims arise out of the same facts and circumstances giving rise to *Durcon*’s other claims which, in turn, appear to be governed by the tariff and the contractual relationship of the parties, initial review by the MPSC is appropriate. [*Durcon, supra* at 563.]

Because this Court did not reach this issue, the comment in footnote three, on which instant defendant relies to create a conflict between *Michigan Basic, supra*, and *Durcon, supra*, can only be regarded as dicta. *Durcon, supra* at 561 n 3. Moreover, footnote three disagreed with the distinction made by our Supreme Court in *Rinaldo’s, supra* at 73-74, between a claimed violation of a tariff and a claim “the tariff contemplates or for which it limits liability.” *Durcon, supra* at 561 n 3. Whether we agree with the distinction, we are still bound by the Supreme Court’s decision. The Supreme Court’s decision is binding until the Supreme Court overrules itself. *O’Dess v Grand Trunk W R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996), quoting *In re Cox Estate*, 383 Mich 108, 117; 174 NW2d 558 (1978). Dicta is defined as “[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” *Dessart v Burak*, 252 Mich App 490, 496 n 5; 652 NW2d 669 (2002), aff’d 470 Mich 37 (2004), quoting *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001).

We also find that *Michigan Basic, supra*,² and *Durcon, supra*, comport with *Travelers, supra*. The issues in *Travelers, supra*, were whether the primary jurisdiction doctrine should be

¹ “Negligence per se allows the use of a violation of a statutory standard of care as evidence of negligence. *Klinke v Mitsubishi Motors*, 458 Mich 582, 612; 581 NW2d 272 (1998) (Kelly, J, dissenting). “Michigan does not subscribe to the doctrine of negligence per se.” *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 82; 600 NW2d 348 (1999).

² Although this Court relied on *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 492-494; 603 NW2d 317 (1999), rev’d 465 Mich 185 (2001), for the proposition that the primary jurisdiction doctrine was more like the affirmative defense of the existence of an arbitration
(continued...)

considered a defense and, if so, whether it needed to be raised in the first responsive pleading.³ *Travelers, supra* at 185. Thus, the holding in *Travelers, supra*, was inapposite to *Michigan Basic, supra*, *Durcon, supra*, and the instant action; however, much of the legal analysis in *Travelers* paralleled the analysis employed in both *Michigan Basic, supra*, and *Durcon, supra*.

Whether an agency should have primary jurisdiction over a claim depends on the agency rule in question and the nature of the claim. *Travelers, supra* at 198; *Michigan Basic, supra* at 530, 534, 537; *Durcon, supra* at 557. An administrative agency has primary jurisdiction over all cases in which it has superior knowledge and expertise. *Travelers, supra* at 200; *Michigan Basic, supra* at 532-533, 538 (agency does not have jurisdiction over case that does not require its unique expertise); *Durcon, supra* at 558, 561. The MPSC has jurisdiction over all matters involving regulation of public utilities, *Travelers, supra* at 201; *Michigan Basic, supra* at 530; *Durcon, supra* at 563, and claims – including tort claims – arising solely from the contractual relationship between the parties, *Travelers, supra* at 195-196, 202; *Michigan Basic, supra* at 533-534; *Durcon, supra* at 559-560 n 2. To determine whether primary jurisdiction should operate, courts must consider the claim in light of the purposes of the doctrine set forth in *Rinaldo's*.⁴ *Travelers, supra* at 198-199, 206-211; *Michigan Basic, supra* at 532; *Durcon, supra* at 558.

Applying the analyses of these cases to the case at hand, there is no question that primary jurisdiction over plaintiff's breach of contract and breach of implied warranties claims belongs with the MPSC. *Travelers, supra* at 195-196, 202; *Michigan Basic, supra* at 533-534; *Durcon, supra* at 559-560 n 2. Moreover, because plaintiff's tort and nuisance claims arise from the same factual allegations supporting its breach of contract and breach of implied warranties claims, it is appropriate to defer to the MPSC for initial review. *Durcon, supra* at 563.

Reversed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens

(...continued)

agreement than subject matter jurisdiction, *Michigan Basic, supra*, at 528, and the Supreme Court reversed on this ground, *Travelers, supra* at 203, 211, this proposition was not material to this Court's holding in *Michigan Basic, supra*, and, thus, was merely dicta.

³ In *Travelers*, the only claim surviving summary disposition was for breach of contract. *Id.* at 188.

⁴ The purposes noted in *Rinaldo's, supra* at 71-72 are:

1. "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue."
2. "the need for uniform resolution of the issue."
3. "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."